IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 2, 2008 Session

GARY M. GOSSETT v. TRACTOR SUPPLY COMPANY, INC.

Direct Appeal from the Chancery Court for Davidson County
No. 04-1484-IV Richard H. Dinkins, Chancellor

No. M2007-02530-COA-R3-CV - Filed March 2, 2009

This is a common-law retaliatory discharge action. The trial court awarded summary judgment to Defendant employer where Plaintiff, discharged at-will employee, alleged he was discharged for refusing to participate in, but not reporting, Defendant's allegedly illegal data reporting practices. The trial court awarded summary judgment to Defendant on the grounds that, under *Collins v. AmSouth Bank,* 241 S.W.3d 879 (Tenn Ct. App. 2007), reporting of the alleged illegal activity is a necessary element of a common-law retaliatory discharge claim. To the extent to which *Collins* so holds, we disagree with *Collins* that a common-law retaliatory discharge claim can never be sustained based on an at-will employee's refusal to participate in an illegal act or an act in contravention of a clearly-established public policy. Summary judgment in favor of Defendant is reversed, and this matter is remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Wade B. Cowan, Nashville, Tennessee, for the appellant, Gary M. Gossett.

Douglas R. Pierce and James Andrew Farmer, Nashville, Tennessee, for the appellee, Tractor Supply Company, Inc.

OPINION

Plaintiff/Appellant Gary Gossett (Mr. Gossett) was employed by Defendant Tractor Supply Company ("Tractor Supply"), a publicly held company subject to the Securities Exchange Act of 1934, as an at-will employee from October 1999 until he was discharged on November 7, 2003. In May 2004, Mr. Gossett filed a complaint against Tractor Supply in the Chancery Court for Davidson County alleging age discrimination in violation of Tennessee Code Annotated § 4-21-101, *et seq*.

Tractor Supply answered in July 2004, denying allegations of discrimination, asserting that its decision to discharge Mr. Gossett was a result of legitimate, non-discriminatory business reasons and raising, *inter alia*, the doctrine of unclean hands as a defense. By agreement of the parties, in October 2004 the trial court allowed Mr. Gossett to amend his complaint to add a claim of common-law retaliatory discharge. In June 2005, again by agreement of the parties, the trial court permitted Mr. Gossett to file a second amended complaint.

In his second amended complaint (hereinafter, "complaint"), Mr. Gossett alleged that, during the course of his employment with Tractor Supply, he became aware of "accounting irregularities" in 2002; "the failure to properly and timely account for vendor support/marketing checks received at the end of fiscal year 2000 and 2001"; and erroneous reporting with respect to its workers' compensation reserve in late 2002 or early 2003. He asserted that, beginning in fiscal year 2000, Tractor Supply's Chief Financial Officer, Calvin Massmann (Mr. Massmann), had instructed him to manipulate data relating to the company's inventory reserve. He further alleged that the data manipulation violated the Securities Exchange Act, particularly as codified at 15 U.S.C. § 78, rules and regulations promulgated under the Act., and general accounting principles. Mr. Gossett alleged that Mr. Massmann and Tractor Supply's Controller, David Lewis (Mr. Lewis) "knowingly and willingly misled investors on a material fact by reporting an understated excess inventory reserve" and that "[t]here was no valid or accepted accounting reason for the change" Mr. Gossett was instructed to make in the data. Mr. Gossett further alleged that Mr. Massmann again requested him to change the inventory reserve analysis at the end of the third quarter of 2003. He asserted that the action Mr. Massmann requested him to take would make the company's financial condition appear stronger. Mr. Gossett asserted,

> [s]ince the initial creation of the inventory reserve, the Company has changed the assumptions used in calculating the inventory reserve to fit whatever numbers the Company needed in a particular quarter to "meet or beat the street." Thus, the inventory reserve is calculated not on accepted accounting principles as required by law, but on what the Company needs for purposes of achieving earnings to meet the public's expectations.

Mr. Gossett prayed for compensatory and punitive damages in an unspecified amount, prejudgment interest, and attorney's fees. He additionally demanded a trial by jury.

Tractor Supply answered in July 2005, denying Mr. Gossett's allegations of age discrimination and retaliatory discharge, and asserting that Mr. Gossett had failed to state a claim upon which relief could be granted. Tractor Supply further asserted that Mr. Gossett was estopped from asserting his claims by his own acts, conduct, or omissions; that the claim was barred by the doctrine of unclean hands; that Mr. Gossett failed to take reasonable steps to mitigate his damages; that Mr. Gossett had waived his claims against Tractor Supply; that Tractor Supply had exercised reasonable care to prevent and correct any false or misleading statements of any material fact under the Securities Exchange Act and that Mr. Gossett had failed to take any preventative or corrective measures. Tractor Supply additionally asserted that its decision to terminate Mr. Gossett's

employment was based on legitimate, non-discriminatory reasons, and that it was without knowledge of Mr. Gossett's refusal to participate in or remain silent about alleged illegal activity. In July 2005, Mr. Gossett voluntarily non-suited his age discrimination claim.

Following discovery, in August 2006 Tractor Supply moved for summary judgment on the grounds that there were no genuine issues of material fact and that Mr. Gossett could not establish a *prima facie* case of retaliatory discharge. Tractor Supply asserted that independent audits of its accounting processes had demonstrated that its processes were legal. Tractor Supply further asserted that the individual who made the decision to terminate Mr. Gossett's employment was unaware of any concerns and complaints of any alleged illegal activity, and that the alleged illegal activities were too remote in time to establish a causal link between those activities and the discharge of Mr. Gossett. Tractor Supply additionally asserted that, even if Mr. Gossett could establish a *prima facie* case, Tractor Supply did not terminate his employment because of his refusal to participate in allegedly illegal activities, but because his position was eliminated to reduce redundancy in management. Tractor Supply asserted that the position of inventory control manager was combined with another management position, and that the combined position was filled with a superior manager. Tractor Supply asserted that Mr. Gossett's "non-existent complaints about illegal activities that never happened played no role in the decision to terminate [his] position."

In its statement of undisputed facts, Tractor Supply submitted that John Trotter (Mr. Trotter), an employee since 1990, had been chosen to manage its entire Accounts Payable Department, which included accounts payable and inventory control. Tractor Supply submitted that Mr. Trotter had assumed responsibility for inventory control from mid-2001 to mid-2002, when Mr. Gossett was employed in the Quality Control Department. Tractor Supply asserted that in November 2003 the position of inventory control manager was merged with that of accounts payable manager, and that Mr. Trotter, a comparatively superior manager, assumed the new combined position. Tractor Supply further asserted that it was subject to an independent annual audit, that Mr. Gossett's allegations of illegal activity or data manipulation were unfounded, and that its "stock balancing provision" had been approved in an independent audit by Price Waterhouse Coopers. Tractor Supply attached the affidavit of Kimberly Vella, its Vice President of Human Resources, and employee evaluation reports in support of its assertions that Mr. Trotter had demonstrated superior skills. Tractor Supply additionally attached the affidavit of Mr. Lewis in support of its position that its accounting procedures had been approved by Price Waterhouse Coopers and that he had made the decision to eliminate Mr. Gossett's position as part of an organizational change. Mr. Lewis stated that he was not aware of Mr. Gossett's allegations of impropriety, or that he had refused to comply with a request by Mr. Massmann to alter his calculations in September 2003. Mr. Lewis further stated that he had no knowledge that Mr. Massmann made such a request. Mr. Lewis, a CPA, stated that Mr. Trotter was chosen to fill the combined management position because he "found, based upon [his] ten years of working with [Mr. Trotter], that he had demonstrated a better understanding of accounting concepts and better accounting technical proficiency than Mr. Gossett."

In his response to Tractor Supply's motion, Mr. Gossett asserted that a genuine issue of material fact existed with respect to whether Tractor Supply's accounting procedures were illegal

under federal securities regulations. He further asserted that genuine issues of material fact existed with respect to whether Mr. Lewis was aware of his refusal to follow Mr. Massmann's instructions, and pointed to Mr. Lewis's deposition testimony that the decision to terminate Mr. Gossett was not his alone. He submitted that he had been in contact with Mr. Lewis and Mr. Massmann on almost a daily basis until Mr. Gossett refused to follow Mr. Massmann's request in September 2003. Mr. Gossett pointed to his own deposition testimony that Mr. Lewis had informed him that he was being terminated for "unacceptable performance" and not a departmental reorganization as asserted by Mr. Lewis. Mr. Gossett stated that as controller and chief financial officer, respectively, Mr. Lewis and Mr. Massmann worked together closely and were directly involved in the inventory control data process. He argued that sufficient evidence existed to reasonably infer that Mr. Lewis was aware of Mr. Gossett's refusal to follow Mr. Massmann's instructions. Mr. Gossett argued that, under *Mason v. Seaton*, 942 S.W.2d 470 (Tenn 1997), an action for retaliatory discharge can be maintained regardless of whether the employer instructed the employee to remain silent about alleged illegal activities. He further asserted that, in accordance with *Mason* and *Thomason v. Better-Bilt Aluminum Products, Inc.*, 831 S.W.2d 291 (Tenn. App. 1992), sufficient compelling circumstantial evidence existed to preclude summary judgment in this case.

Following a hearing in October 2006, the trial court determined that genuine issues of material facts precluded summary judgment. The trial court entered an order denying summary judgment on October 24, 2006. The matter was set to be heard by a jury in September 2007. In August 2007, however, Tractor Supply filed a motion to reconsider and to grant summary judgment in light of the holding of the Middle Section of this Court in *Collins v. AmSouth Bank*, No. M2005-02544-COA-R3-CV, which was released on July 26, 2007. In its motion, Tractor Supply argued that, under *Collins*, in order to succeed on a claim for retaliatory discharge for "refusal to participate," the plaintiff must "produce evidence that he 'ma[d]e a report to some entity other than the person or persons who [asked the plaintiff to participate] in the allegedly illegal activities.'" Tractor Supply submitted that, because Mr. Gossett acknowledged that he did not report his alleged refusal to participate to anyone other than the person who asked him to engage in allegedly illegal activity, an essential element for his claim for retaliatory discharge had been negated. Tractor Supply argued that it was entitled to a judgment as a matter of law under *Collins*.

In his response to Tractor Supply's motion to reconsider, Mr. Gossett asserted that the statement made in *Collins* on which Tractor Supply relied was dicta and that *Collins*, a then unreported case, was contrary to reported opinions of the Tennessee Supreme Court. He argued that the decision in *Collins* was based on the plaintiff's failure to establish that she had refused to participate in activity that was illegal or in violation of defendant bank's policies, and that the plaintiff accordingly could not have prevailed regardless of whether she had reported the activity. Mr. Gossett additionally argued that *Collins* was not consistent with supreme court precedent, including *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn. 1994), and *Mason v. Seaton*, 942 S.W.2d 470 (Tenn. 1997). He further cited *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552 (Tenn. 1988), as illustrative of acts found to be in violation of clearly defined public policy. Mr. Gossett submitted that the *Collins* court's reliance on *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d (Tenn. App. 2005), and *Merryman v. Central Parking System, Inc.*, No. 01A01-9203-CH-

00076, 1992 WL 330404 (Tenn. Ct. App. Nov. 13, 1992), for the proposition that every claim for common-law retaliatory discharge must include evidence that the plaintiff reported the illegal activity was overly broad. In his response, Mr. Gossett acknowledged that *Collins* may be read to support the position taken by Tractor Supply, and further acknowledged that the author of *Collins* had subsequently been named to the Tennessee Supreme Court. He respectfully suggested, however, that, to the extent that *Collins* required a reporting of illegal activity in a common-law retaliatory discharge action arising from the refusal to participate in illegal activity, it was an inaccurate statement of the law as declared by the supreme court.

The trial court granted Tractor Supply's motion to reconsider and entered summary judgment in its favor on August 30, 2007. In its order, the trial court determined that, in light of the entire record, Tractor Supply was entitled to judgment as a matter of law, "especially in light of *Collins*[.]" In September 2007, Mr. Gossett moved the court to alter or amend its judgment to reflect that its decision to reconsider its previous denial of summary judgment and to enter judgment in favor of Tractor Supply was based on its finding that Mr. Gossett had not reported the alleged illegal activity and on this Court's holding in *Collins*. The trial court granted Mr. Gossett's motion to alter or amend, and entered final judgment in the matter on October 11, 2007. In its final order, the trial court stated that, under *Collins*, the reporting of the allegedly illegal activity is an essential element of a cause of action for retaliatory discharge. The trial court determined that, because Mr. Gossett had not reported his allegation of illegal activity to anyone other than the person who allegedly was involved in that activity, Tractor Supply was entitled to judgment as a matter of law.

Mr. Gossett filed a timely notice of appeal to this Court on November 7, 2007. *Collins v. AmSouth Bank* subsequently was published in accordance with Rule 11 of the Rules of the Tennessee Court of Appeals.[1] *See Collins v. AmSouth Bank*, 241 S.W.3d 879 (Tenn. Ct. App. 2007). Mr.

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[1] Rule 11 of the Rules of the Court of Appeals provides:

Publication of Opinions Where No Application for Permission to Appeal to the Tennessee Supreme Court is Filed

(a) Opinions of this Court, including abridgements thereof, from which no application for permission to appeal to the Tennessee Supreme Court has been filed, shall be published only with the approval of this Court as provided for herein.

(b) An opinion of this Court from which no application for permission to appeal to the Tennessee Supreme Court has been filed shall be published only if, in the determination of the members of this Court, it meets one or more of the following criteria:

(1) The opinion establishes a new rule of law or alters or modifies an existing rule or applies an existing rule to a set of facts significantly different from those stated in other published opinions;

(2) The opinion involves a legal issue of continuing public interest;

(3) The opinion criticizes, with reasons given, an existing rule of law;

(4) The opinion resolves an apparent conflict of authority;

(5) The opinion updates, clarifies or distinguishes a principle of law; or

(6) The opinion makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution,

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Gossett's appeal of the judgment of the Davidson County Chancery Court was assigned to the Western Section of this Court, which heard oral argument of the matter in Nashville on December 2, 2008.

Issues Presented

Mr. Gossett presents the following issue for our review:

> Whether an employee who is terminated for refusing to participate in illegal activities must also report the illegal activities in order to establish a common law cause of action for retaliatory discharge.

Tractor Supply recites the following issues:

> (1) Should the Court now accept Appellant's invitation to overturn *Collins* in this indistinguishable case?
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> (2) Even if this Court overturns Collins, whether summary judgment was still appropriate in this case because Appellant cannot establish a prima facie case of retaliation or that the legitimate reason for the elimination of his job was a pretext.

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statute, or other written law.

(c)(1) An opinion of this Court, or an abridgement thereof, from which no application for permission to appeal to the Tennessee Supreme Court has been filed may be submitted to this Court for consideration for publication only after the expiration of the period of time permitted by the Tennessee Rules of Appellate Procedure to apply to the Tennessee Supreme Court for permission to appeal. Along with the opinion, the author shall state the reasons why the publication of the opinion is appropriate.

(2) If within thirty (30) days of the date an opinion has been submitted to all members of this Court, seven (7) members have approved publication of the opinion, the presiding judge shall notify the author of the opinion in writing that the opinion may be published.

(3) Approvals or objections to the publication of an opinion shall be made in writing and shall be sent to the presiding judge within thirty (30) days after the opinion has been submitted to the members of this Court. Where no written response is received from a member of this Court within thirty (30) days, the lack of response shall be treated as an affirmative vote for publication. The presiding judge shall, upon request, share the substance of the responses with the author of the opinion.

(d) Any judge of this Court may make minor editorial changes in an opinion authored by that judge once the opinion has been filed. These changes may include corrections in spelling, punctuation, or syntax. However, any abridgement that significantly alters the sense or emphasis of an already filed opinion shall be submitted to this Court prior to publication.

(e) In cases wherein concurring or dissenting opinions have been filed, the author of the concurring or dissenting opinion shall determine whether the concurring or dissenting opinion should be published with the majority opinion or whether only the position of the concurring or dissenting judge should be noted.

Standard of Review

Our review of a trial court's award of summary judgment is well-settled and recently has been clarified more definitively by the supreme court. We review a trial court's award of summary judgment *de novo* with no presumption of correctness, reviewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008)(citations omitted).

Summary judgment is appropriate only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at 83 (quoting Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000)). The burden of persuasion is on the moving party to demonstrate, by a properly supported motion, that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.* (citing *see Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). The nonmoving party's "burden to produce either supporting affidavits or discovery materials is not triggered" if the party moving for summary judgment fails to make this showing, and the motion for summary judgment must be denied. *Id.* (quoting *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88). The moving party may carry its burden by "(1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial." *Id.* (citing *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n. 5). Additionally, a mere "assertion that the nonmoving party has no evidence" will not suffice. *Id.* at 84 (citing *Byrd*, 847 S.W.2d at 215). "[E]vidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient." *Id.* (citing *McCarley*, 960 S.W.2d at 588). Rather, "[t]he moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008)(citing *Hannan*, 270 S.W.3d at 5). In order to negate an essential element, "the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party." *Id.* at 84 (citing *see Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004)). The motion for summary judgment must be denied if the moving party does not make the required showing. *Id.* (citing *Byrd*, 847 S.W.2d at 215).

After the moving party has made a properly supported motion, the nonmoving party must "produce evidence of specific facts establishing that genuine issues of material fact exist." *Id.* (citing *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215). To satisfy its burden, the nonmoving party may: (1) point to evidence of over-looked or disregarded material factual disputes; (2) rehabilitate evidence discredited by the moving party; (3) produce additional evidence that establishes the existence of a genuine issue for trial; or (4) submit an affidavit asserting the need for additional discovery pursuant to Rule 56.06 of the Tennessee Rules of Civil Procedure. *Id.* (citing *McCarley*,

960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n. 6). The court must accept the nonmoving party's evidence as true, resolving any doubts regarding the existence of a genuine issue of material fact in that party's favor. *Id.* (citing *McCarley*, 960 S.W.2d at 588). "'A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.'" *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008)(quoting *Byrd*, 847 S.W.2d at 215). "A disputed fact presents a genuine issue if 'a reasonable jury could legitimately resolve that fact in favor of one side or the other.'" *Id*. With this standard in mind, we turn to the issues raised on appeal.

Analysis

The gravamen of the issue raised by Mr. Gossett on appeal is whether *Collins v. AmSouth Bank*, 241 S.W.3d 879 (Tenn. Ct. App. 2007), is over-broad in light of supreme court precedent to the extent to which *Collins* holds that the reporting of an alleged illegal activity is an essential element of a retaliatory discharge claim. Restated, Mr. Gossett raises the issue of whether a common-law cause of action for retaliatory discharge exists where an employee has been terminated for refusing to participate in an illegal activity. Tractor Supply, on the other hand, submits that *Collins* correctly states the necessary elements of a retaliatory discharge claim. It further contends that, even if we determine that *Collins* is over-broad, Mr. Gossett has failed to establish a *prima facie* case where Tractor Supply's accounting procedures were not illegal or in violation of federal regulations and where it terminated Mr. Gossett's employment as part of an overall management restructuring.

I.

We turn first to whether *Collins* is over-broad where it mandates that a plaintiff asserting a retaliatory discharge claim must demonstrate (1) that his employer committed an illegal act; and (2) that the employee reported that illegal act or instruction to someone other that the person alleged to have performed or requested it. *Collins*, 241 S.W.3d at 885-86. *Collins* provides: "[w]ithout any evidence regarding these two essential ingredients of a retaliatory discharge claim, [the plaintiff's] statutory and common-law whistleblowing claims must fail." *Id.* at 886.

We begin our analysis by noting that the plaintiff in *Collins* asserted both a common-law and statutory retaliatory discharge claim. Under *Collins*, the reporting of a demonstrated illegal activity is "essential" to both claims. Although *Collins* arguably is over-broad with respect to the statutory cause of action provided by Tennessee Code Annotated § 50-1-304, we decline to address that issue here where the case before us pertains only to the common-law cause of action.[2] Thus, the resolution

[2]We recognize, however, the supreme court's observation in *Mason v. Seaton*, 942 S.W.2d 470 (Tenn. 1997), that, in Tennessee Code Annotated § 50-1-304, the legislature "extended" the common-law cause of action to include discharge for "refusing to remain silent about the existence of such violations [of a statute, regulation or rule] at their place of employment." The court noted that, under the section, "an employer cannot discharge employees for refusing 'to participate in, or for refusing to remain silent about, illegal activities' at the work place." *Id*. at 475. In *Guy v.* (continued...)

of whether a statutory cause of action is available to a plaintiff whose employment was terminated solely for refusing to participate in an illegal activity where the plaintiff did not report that activity must be left for another day.

We additionally note that the author of this Opinion agrees with the ultimate judgment in *Collins* and consented to its publication pursuant to Rule 11 of the Rules of the Court of Appeals. However, in light of our re-analysis of *Collins*, we agree with Mr. Gossett that, although *Collins* unambiguously sets forth reporting as an essential element of any retaliatory discharge claim, the court's statement is dicta where it was unnecessary to the holding in that case. The plaintiff in *Collins* was discharged by defendant AmSouth Bank following an investigation into an argument precipitated by the bank's assistant manager's instructions that plaintiff vault teller place cash in the bank's night deposit drop box for use by a substitute teller the following day. *Collins v. AmSouth Bank*, 241 S.W.3d 879, 881-82 (Tenn. Ct. App. 2007). Plaintiff refused to follow the instructions and, following a "heated argument," the assistant manager called the bank manager for assistance. *Id.* The manager arrived at the branch and interviewed both employees about the incident. *Id.* at 882. The manager was "convinced that [plaintiff] had acted in a threatening manner during the

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Mutual of Omaha Insurance Co., 79 S.W.3d 528, 537 (Tenn 2002), a "whistleblowing" action, the supreme court opined that the key distinctions between the statute and the common-law tort indicate that the two remedies are "cumulative," and that the statute does not preempt the common-law tort. The court identified the primary distinctions as (1) the increased burden of proof under the statutory remedy requiring the plaintiff to demonstrate that his behavior was the sole reason for his discharge as opposed to the common-law "substantial factor" requirement and (2) protection under the statute was extended to public employees. *Guy*, 79 S.W.3d at 537.

The Code provides, in pertinent part:

> (a) As used in this section:
> (1) "Employee" includes an employee of the state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state;
> (2) "Employer" includes the state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state; and
> (3) "Illegal activities" means activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.
> (b) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.
> (c) In addition to all employees in private employment, this section applies to all employees who receive compensation from the federal government for services performed for the federal government, notwithstanding that the persons are not full-time employees of the federal government.
> (d)(1) Any employee terminated in violation of subsection (b) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled.
> (2) Any employee terminated in violation of subsection (b) solely for refusing to participate in, or for refusing to remain silent about, illegal activities who prevails in a cause of action against an employer for retaliatory discharge for the actions shall be entitled to recover reasonable attorney fees and costs.

Tennessee Code Annotated § 50-1-304(a)(b)(c) & (d)(2008).

argument and that [the assistant manager] had feared for her own safety." *Id*. The manager requested an immediate investigation by the bank's human resource department and, following interviews of several employees by the manager and a human resource officer, it was discovered that the plaintiff and assistant manager had a history of disagreements and that employees "believed [plaintiff] had been the aggressor." *Id.* Ultimately, the human resource department determined that plaintiff had a history of acting "in an aggressive manner" and terminated plaintiff's employment." *Id.* The trial court in *Collins* awarded summary judgment to defendant based on its determination that defendant had demonstrated a legitimate, non-pretextual reason for terminating plaintiff's employment, and that plaintiff had not pointed to "anything in the record that could provide a basis for concluding that [defendant's] stated reason for terminating her employment was pretextual." *Collins v. AmSouth Bank*, 241 S.W.3d 879, 883 (Tenn. Ct. App. 2007). The *Collins* court further noted that

> [t]he trial court also concluded that the undisputed facts demonstrated that, even if [plaintiff] believed in good faith that she was complaining about an illegal activity or violation of some clear public policy, these complaints were neither the sole reason nor even a substantial motivating factor for the termination of her employment.

Id. Thus, the basis of the trial court's award of summary judgment in that case was that the record contained no evidence suggesting that defendant's asserted motivation, i.e., the plaintiff's history of aggressive behavior, was pretextual. Further, *Collins* arguably is inconsistent with the facts recited within the opinion where plaintiff did, in fact, report or complain of the alleged illegal activity of her supervisor to both the bank manager and the human resources department. Accordingly, the award of summary judgment in *Collins* was based on plaintiff's failure to demonstrate that her reporting or refusal to participate was a motivating factor, much less a substantial motivating factor, in defendant's decision to terminate her employment. This Court affirmed the trial court's award of summary judgment on that basis.

We are sensitive, however, to the trial court's position where the statement is, as noted, a rather unambiguous declaration of law from this Court. Further, in light of our analysis of the body of case law pertaining to retaliatory discharge in this State, including the opinions of this Court on which *Collins* relies, we agree with Mr. Gossett that the declaration of law in *Collins* is an over-broad statement of the law as set forth by the Tennessee Supreme Court and in previous opinions of this Court.

The Tennessee Supreme Court first recognized a common-law retaliatory discharge cause of action in 1984 in *Clanton v. Cain-Sloan Company*, 677 S.W.2d 441 (Tenn. 1984). The *Clanton* court addressed, as an issue of first impression, whether a cause of action for retaliatory discharge may be pursued by an at-will employee whose employment is terminated for filing a worker's compensation claim. *Clanton*, 677 S.W.2d at 442. Following a discussion of the history and purpose of the workers' compensation laws, the supreme court considered whether an exception to Tennessee's long-standing employment-at-will doctrine should be recognized where an employee

is discharged for exercising the employee's rights under the workers' compensation laws. The court opined that to permit an employer to discharge an employee for exercising the employee's rights under the workers' compensation statutes would "completely circumvent" the legislative scheme. *Id.* at 444. The court held that a retaliatory discharge cause of action was necessary in order to enforce the duty of the employer and protect the rights of the employee under the statutes. *Id.* at 445.

The *Clanton* court carved out a narrow exception to the employment-at-will doctrine, recognizing a cause of action for retaliatory discharged where an employee is discharged for exercising a statutory right. In 1988, the court clarified the exception created in *Chism*, addressing whether the cause of action was available to an employee who was discharged for "refusing to participate in, continue to participate in, or to remain silent about illegal activities." *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 553 (Tenn. 1988); *see also Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn. 1992)(stating: *Clanton* was not limited to claims arising from the exercise of rights under workers' compensation laws, but retaliatory discharge action is available to employees asserting discharge as result of their employer's violation of a clear statutory policy). The plaintiff in *Chism* alleged he was discharged for insisting that his employer comply with the Internal Revenue Code. *Chism*, 762 S.W.2d at 554. The *Chism* court held that the plaintiff's complaint was "too general" to state a claim for retaliatory discharge where it failed to allege that plaintiff had been asked or required to participate in the alleged illegal acts; that he had refused to participate in or remain silent about those acts; that he took any action to suppress the alleged violations; or that he had any connection to or responsibility for the employer's tax records. *Id.* at 553, 555. However, the *Chism* court recognized an action for retaliatory discharge when a substantial factor in an employer's decision to discharge an employee is the employees' refusal to participate in, to continue to participate in, or to remain silent about his employer's "violation of some well-defined and established public policy" generally "evidenced by an unambiguous constitutional, statutory or regulatory provision." *Id.* at 556.

In *Anderson v. Standard Register Co.*,857 S.W.2d 555, 556 (Tenn. 1993), a case in which an employee alleged she was discharged in retaliation for filing for workers' compensation benefits, the supreme court noted that the retaliatory discharge cause of action "defines the balance point between the employment-at-will doctrine[,]" under which an employee may be discharged for good cause, bad cause, or no cause at all, and the "rights granted employees under well-defined public policy." *Anderson*, 857 S.W.2d at 556. The *Anderson* court observed that an employee's right to "refuse to participate in or be silent about illegal activity at the work place" is among the public policies clearly defined by the legislature in Tennessee Code Annotated § 50-1-304. *Id.* The court further noted that, consistent with *Chism*, other "clearly defined public policies could warrant the protection provided by an action for retaliatory discharge." *Id.* at 556 (citing *Chism v. Mid-South Milling Co, Inc.*, 762 S.W.2d 552, 556 (Tenn. 1988)). The *Anderson* court emphasized that the employer must have violated a clear public policy to be liable for retaliatory discharge, and that the violation must have been a "substantial factor" in the discharge of the at-will employee plaintiff. *Id.* at 557. The court additionally emphasized that the action requires a "causal nexus" between the employee's activities and the employer's conduct in discharging the employee. *Id.* In *Mason v. Seaton*, a case in which the plaintiff employee reported her employer's violation of the fire code, the

court held that an employee pursuing a retaliatory discharge cause of action under section 50-1-304 is not required to show that the employer ordered or instructed the employee to remain silent about or refrain from reporting an illegal activity, and that the absence of such is not fatal to the claim. In one of its most recent opinions regarding a retaliatory discharge cause of action, *Crews v. Buckman Laboratories International*, 78 S.W.3d 852 (Tenn. 2002), the supreme court reiterated the elements of a common-law retaliatory discharge cause of action:

> (1) that an employment-at-will relationship existed;
> (2) that the employee was discharged;
> (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and
> (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.

Crews, 78 S.W.3d at 862 (citing *see, e.g., Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 825 (Tenn. 1994)*; Anderson v. Standard Register Co.*, 857 S.W.2d 555, 558 (Tenn. 1993); *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 556 (Tenn. 1988)).

We can find no case in which the supreme court held that a common-law retaliatory discharge cause of action was not available to an employee who claimed to have been discharged for refusing to participate in an illegal act or one in contravention of a clearly defined public policy because that employee did not also report the alleged activity. We observe that some statements of the supreme court, taken out of context of the entirety of the opinion, may suggest that reporting, or "whistleblowing," is a necessary element of the statutory and common-law cause of action. For example, in *Guy v. Mutual of Omaha Insurance Co.*, 79 S.W.3d 528 (Tenn. 2002), the supreme court stated:

> [i]ndeed, in *Chism*, this Court first recognized as a cognizable cause of action a plaintiff's claim for retaliatory discharge when the at-will plaintiff-employee is discharged for *refusing to remain silent* about illegal activities.

Guy, 79 S.W.3d at 535(emphasis added). We note, however, that *Guy* was, as a factual matter, a "whistleblowing" case. The plaintiff in *Guy* asserted a common-law cause of action for retaliatory discharge alleging that he was terminated for reporting alleged irregularities of his employer to the Tennessee Department of Commerce and Insurance. *Id.* at 533. There was no "refusal to participate" allegation in that case. Similarly, *Crews v. Buckman Laboratories International*, 78 S.W.3d 852 (Tenn. 2002), and *Mason v. Seaton*, 942 S.W.2d 470 (Tenn. 1997), were cases in which the plaintiff alleged discharge in retaliation for "whistleblowing." In such cases, it is axiomatic that evidence of sufficient reporting and a causal nexus between that reporting and the plaintiff's discharge are essential to the cause of action.

On the other hand, considerable supreme court case law indicates that reporting is not an essential element of a common-law cause of action for retaliatory discharge. There was no discussion or assertion of reporting or "whistleblowing" in *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997); *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn. 1994); *Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993); or *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). Rather, in those cases, the supreme court addressed the merits of the retaliatory discharge action notwithstanding the absence of an assertion that the employee reported the alleged illegal act. *See Stein*, 945 S.W.2d at 716-19 (affirming dismissal of action because plaintiff failed to identify violation of clear public policy where she alleged discharge in violation of right to privacy following random drug screening); *Reynolds*, 887 S.W.2d at 823, (reinstating jury verdict in favor of plaintiffs who asserted retaliatory discharge for refusal to violate safety provision of Tennessee Motor Carriers Act requiring inspection prior to operation of truck); *Anderson*, 857 S.W.2d at 558-59, (affirming summary judgment in favor of defendant employer where plaintiff failed to present evidence that workers' compensation claim was factor in discharge); *Hodges*, 833 S.W.2d at 898-99, 901, (affirming jury verdict in favor of plaintiff discharged because of lengthy jury service; reinstating jury award of compensatory damages in excess of statutory remedies provided by Tennessee Code Annotated § 22-4-108; restricting award of punitive damages to cases arising from "only the most egregious of wrongs").

Notably, the *Reynolds* court observed: "[t]here have been several cases where employees were discharged for refusing to falsify records or to acquiesce in the mislabeling of unsafe or defective products." *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 824 (Tenn. 1994) (citations omitted). Significantly, moreover, the plaintiff in *Chism*, the case cited by the *Guy* court as the case in which the court first recognized the common-law cause of action, did not assert that he reported alleged illegal activities, and the court did not affirm summary judgment to the defendant on that basis. Rather, the plaintiff in *Chism* failed to sufficiently assert that he refused to remain silent about or that he refused to participate in his employer's alleged violations of the Internal Revenue Code. Additionally, he failed to allege violations of the Code with any specificity. Thus, the court held his complaint was "too general" to sustain a cause of action. *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 555 (Tenn. 1988). In so holding, the *Chism* court observed that plaintiff's complaint "at no point contain[ed] any allegation that the employee was terminated because he did not participate in or suppress alleged violations, and there [was] a total absence of any allegation that he was requested or required to remain silent concerning them." *Id.* at 553.

We next turn to the opinions of this Court on which *Collins* relies for the proposition that, in order to maintain a common-law action for retaliatory discharge, the plaintiff employee must demonstrate that they reported the employer's alleged illegal activity or violation of important public policy to "some entity other than the person or persons who are engaging in the allegedly illegal activities." *Collins v. AmSouth Bank*, 241 S.W.3d 879, 885 (Tenn. Ct. App. 2007)(citing *Emerson v. Oak Ridge Research, Inc*., 187 S.W.3d 364, 371 (Tenn. Ct. App. 2006); *Merryman v. Cent. Parking Sys., Inc.*, No. 01A01-9203-CH-00076, 1992 WL 33040, at *7 (Tenn. Ct. App. Nov. 13, 1992)(*overruled on other grounds by Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993)). We begin our analysis of these cases by noting that the plaintiff in both cases asserted

discharge as a result of reporting illegal activity. This Court's discussion of the reporting element in those cases centered on the question of what constitutes "reporting" for the purposes of a retaliatory discharge action under Tennessee Code Annotated § 50-1-304.[3]

The *Merryman* court adopted the analytical framework of a common-law action, modifying it to reflect the exclusive causal relationship required by the statute. The *Merryman* court identified the elements necessary for a statutory cause of action as:

> (1) The plaintiff's status as an employee of the defendant; (2) the plaintiff's refusal to participate in, or to remain silent about, illegal activities, (3) the employer's discharge of the employee, and (4) an exclusive causal relationship between the plaintiff's refusal to participate in or to remain silent about illegal activities and the employer's termination of the employee.

Merryman, 1992 WL 33040, at *6. The *Merryman* court opined that, in order to constitute "reporting," the plaintiff must have reported the alleged illegal activity to someone other than the person alleged to have committed that activity. *Id.* at *7. The *Merryman* court determined that plaintiff had not reported the alleged illegal activity (unsafe flying practices) of his supervisor where he did not discuss that activity with anyone other than the supervisor. *Id.* The *Merryman* court further noted, however, that in addition to failing to report the alleged activity, the plaintiff was not instructed or requested to participate in that activity. *Id.* The court emphasized that the cause of action required that the plaintiff either refuse to participate in or to remain silent about alleged illegal activity, and that the plaintiff in *Merryman* did neither where his private discussion with his supervisor did not fulfill the reporting prong of the cause of action and where he was not asked to participate in alleged unsafe flying practices. *Id. Merryman* does not, in our view, stand for the proposition that a cause of action for retaliatory discharge cannot be maintained based on the refusal to participate in an illegal activity at the work place.

Likewise, this Court did not address whether a retaliatory discharge cause of action always requires a "reporting" in *Emerson*. The plaintiff in *Emerson* asserted she was discharged in retaliation for contacting her attorney who, acting on her behalf, sent a letter to her supervisor/employer complaining of sexual harassment and a hostile working environment. *Emerson v. Oak Ridge Research, Inc*., 187 S.W.3d 364, 376 (Tenn. Ct. App. 2006). She asserted that she was discharged for refusing to remain silent about alleged harassment by her supervisor, who also managed the company. *Id.* at 367, 376. There was no allegation of discharge for refusing to participate in illegal activity in *Emerso*n. Rather, the issue in that case was whether the complaint to the plaintiff's supervisor, the person alleged to have engaged in the illegal activity, was sufficient

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[3] The *Merryman* court affirmed dismissal of plaintiff's common-law action as preempted by the enactment in 1990 of the Public Protection Act, codified at Tennessee Code Annotated § 50-1-304. *See Merryman v. Cent. Parking Sys., Inc.*, No. 01A01-9203-CH-00076, 1992 WL 33040, at *7 (Tenn. Ct. App. Nov. 13, 1992). To the extent to which *Merryman* held the statutory cause of action reflected the legislature's attempt to preempt the common-law action, *Merryman* has been overruled. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002); *Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993).

to constitute reporting where the supervisor also served in the capacity of company management. *Id.* at 371. The *Emerson* court held the complaints to plaintiff's supervisor constituted reporting under *Merryman* where the offending supervisor and company management were the same person. *Id.* at n.1. Thus, neither *Merryman* nor *Emerson* stand for the proposition that a common-law retaliatory discharge cause of action necessarily requires a "reporting" and cannot be maintained based on discharge for the refusal to participate in an illegal act or one which violates a clear public policy.

Additionally, the philosophy and purpose behind the common-law retaliatory discharge action is to temper the at-will doctrine by restricting an employer's right to discharge an employee in contravention of a well-defined and established public policy or when the employee is exercising a statutory or constitutional right. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002); *Crews v. Buckman Labs. Int'l*, 78 S.W.3d 852, 858 (Tenn. 2002). Its purpose is to "encourage employers to refrain from conduct that is injurious to the public interest." *Crews*, 78 S.W.3d at 862. The cause of action arises from the recognition that "certain well-defined, unambiguous principles of public policy confer upon employees implicit rights which must not be circumscribed or chilled by the potential of termination." *Id.* at 858. Thus, an employee cannot be discharged because he refuses to participate in or to be silent about illegal activity at his place of employment. *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 556 (Tenn. 1993)(discussing protections afforded by statute and noting the common-law action protects additional well-defined public policies). Additionally, the supreme court has not altered the elements of the common-law cause of action in its most recent cases. The *Crews* court defined the requisite elements as:

> (1) that an employment-at-will relationship existed; (2) that the employee was discharged; (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with a clear public policy.

Crews, 78 S.W.3d at 862 (citations omitted). As noted above, it has not explicitly disallowed the action absent evidence of reporting where the action was predicated on the refusal to participate in an illegal activity.

In addition to *Merryman*, moreover, other cases considered by this Court exemplify our disinclination to confine the common-law action to those involving only "whistleblowing." In *Franklin v. Swift Transportation Co.*, 210 S.W.3d 521, 530 (Tenn. Ct. App. 2006), for example, we observed that the retaliatory discharge action arises from the public policy principle that "an employee should not be placed in the moral, ethical and legal dilemma of being forced to choose between reporting *or participating in illegal activities* and keeping his job." *Franklin*, 210 S.W.3d at 530 (emphasis added). *Franklin*, moreover, was not a "whistleblowing" case, but one wherein the plaintiff asserted he was discharged for refusing to drive a truck carrying only a photocopy of the IRP

card required Tennessee Department of Transportation, and not the original card as required by the regulation. *Id.* at 529. We affirmed summary judgment in favor of defendant where the regulation on which plaintiff relied did not implicate a fundamental public policy. *Id.* at 533. The absence of a reporting, however, was not fatal to the plaintiff's cause of action in *Franklin*.

Notwithstanding *Collins*, we continue to recognize that a common-law cause of action exists where an employer's discharge of an at-will employee is substantially motivated by the employee's refusal either to participate in or to remain silent about illegal activities. *See Williams v. Columbia Housing Auth*., No. M2007-01379-COA-R3-CV, 2008 WL 4426880 (Tenn. Ct. App. Sept. 30, 2008)(*no perm. app. filed*)(Western Section at Nashville)(holding plaintiff failed to establish *prima facie* case where record contained no indication plaintiff was discharged for failing to participate in or for reporting alleged illegal activity); *Bridgestone/Firestone, Inc. v. Orr*, No. M2006-2638-COA-R3-CV, 2008 WL 80200 (Tenn. Ct. App. Jan. 7, 2008), *perm app. denied* (Tenn. June 23, 2008)(Western Section at Nashville)(affirming summary judgment in favor of defendant where plaintiff failed to show causal relationship between reporting or a refusal to participate in illegal activity, and where defendant demonstrated employee was discharged for embezzlement).

Clearly, the retaliatory discharge cause of action has never been a dispute resolution method, and it is not available to a plaintiff who is disgruntled by or who disagrees with management decisions. *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 555-56 (Tenn. 1988). The courts have clearly recognized that an employee may be discharged over policy decisions which are not illegal or which do not violate an established public policy. *Id.* at 555. Since the supreme court's decisions in *Clanton* and *Chism*, however, an employer may not discharge an employee for refusing to participate in or for refusing to remain silent about work place violations of the law or of a defined, established public policy where the discharge is substantially motivated by that refusal. *Id.* at 555-57.

Accordingly, we now hold that a common-law cause of action for retaliatory discharge may be maintained where an employer's termination of an at-will employee's employment is substantially motivated by the employee's refusal to participate in an illegal activity or one which violates a clear and well-defined public policy of this State. *Collins* is over-broad insofar as it is contrary to this holding.

II.

We next turn to Tractor Supply's assertion that, even if we conclude that *Collins* was over-broad with respect to the reporting requirement, summary judgment was nevertheless appropriate in this case. In its brief to this Court, Tractor Supply contends that Mr. Gossett cannot establish a *prima facie* case of retaliation and that he cannot demonstrate that the reason proffered by Tractor Supply for discharging him was a pretext. Tractor Supply asserts that, in addition to the failure to report alleged illegal activity, Mr. Gossett's claim must fail where 1) Tractor Supply's accounting practices were not illegal and 2) where it demonstrated that its decision to terminate Mr. Gossett's employment based on a non-pretextual, legitimate business decision. Although the trial court did

not address Tractor Supply's assertions in its order awarding its summary judgment, we address Tractor Supply's argument as an assertion that we should award summary judgment on other grounds.

Tractor Supply's argument requires us to determine whether, consistent with the standards defined in *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008), and *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008), Tractor Supply has negated Mr. Gossett's assertion that its activity was illegal or in violation of established public policy for summary judgment purposes. If any doubt remains with respect to the legality of Tractor Supply's activities, summary judgment is not appropriate. *See Hannan*, 270 S.W.3d at 8-9. If any doubt regarding the whether Tractor Supply's activities were illegal or in contravention of an important public policy, we must then consider whether any doubt remains with respect to whether Mr. Gossett's alleged refusal to participate in those activities was a substantial factor in Tractor Supply's decision to terminate his employment.

Having reviewed the entire record in this case, we agree with the determination implicitly made by the trial court when it denied Tractor Supply's first motion for summary judgment in October 2006 that a genuine issue of material fact exists with respect to Mr. Gossett's allegations that Tractor Supply engaged in illegal activities or activities in contravention of public policy with respect to data reporting in statements ultimately affecting the value of its stock and financial reporting required by the Securities Exchange Act.

We next turn to whether a genuine issue of material fact exists with respect to whether Mr. Gossett's refusal to participate in or to continue to participate in the alleged illegal activities was a substantial factor in Tractor Supply's decision to discharge him, or whether Tractor Supply has carried its burden to prove a legitimate, nonpretextual and nonretaliatory reason for discharging Mr. Gossett. As the courts have observed with respect to the causation element of a retaliatory discharge action, "direct evidence of [the employer's] motivation is rarely within the plaintiff's possession." *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 391 (Tenn. Ct. App. 2006)(quoting *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002)). Causation, or the employer's motivation in discharging the employee, must be gleaned from careful consideration of the entirety of the evidence of the circumstances surrounding the employer's action in light of the employee's refusal to participate in or remain silent about alleged illegal activities. *See id.* In light of the facts noted above, and particularly noting that Tractor Supply's reorganization of its Accounts Payable Department apparently resulted in only Mr. Gossett being discharged, we agree with the trial court's determination that summary judgment is not appropriate at this juncture.

Holding

In light of the foregoing, we reverse summary judgment in favor of Tractor Supply. This matter is remanded to the trial court for further proceedings. Costs of this appeal are taxed to the Appellee, Tractor Supply Company.

Assuming the statement in *Collins* that the reporting of alleged illegal activity is an essential element of a retaliatory discharge action is not dicta, we recognize that this Opinion creates a division between the Western and Middle Sections of this Court. We respectfully encourage the supreme court to resolve the question of whether a common-law cause of action for retaliatory discharge exists for the refusal to participate in an alleged illegal activity or activity in contravention of a well-established public policy in the absence of a reporting to someone other than the person alleged to have instructed the employee to perform that act.

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DAVID R. FARMER, JUDGE